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No. 03-107

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JO LARA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

In *Duro* v. *Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes had lost their inherent sovereign power to prosecute members of other Tribes for offenses committed on their reservations. Congress responded to the Court's decision by amending the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, to "recognize[] and affirm[]" the "inherent power" of Tribes to "exercise criminal jurisdiction over all Indians." The question presented is:

Whether Section 1301, as amended, validly restores the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for offenses with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	11
Argument:	
The United States is not barred by the Double Jeopardy Clause of the Fifth Amendment from prosecuting respondent for a federal offense that contains the same elements as the tribal offense for which he was previously prosecuted	14
I. The Double Jeopardy Clause permits the United States and an Indian Tribe, as separate sovereigns, to prosecute a non-member Indian for crimes that contain the same elements	14
A. The Double Jeopardy Clause has no application to prosecutions by separate sovereigns	14
B. The post-*Duro* amendment to the Indian Civil Rights Act can only be understood as a restoration of Tribes' sovereign power to prosecute violations of their laws by members of other Tribes	17
1. The text of amended Section 1301(2) speaks of restoring a tribal sovereign power	18
2. The legislative history of amended Section 1301(2) reflects Congress's intent to restore a tribal sovereign power	18

TABLE OF CONTENTS—Continued: Page

3. Congress's purpose to combact crime by non-member Indians demonstrates that amended Section 1301(2) was designed to restore tribal sovereign power 19
4. Principles of constitutional avoidance do not justify construing amended Section 1301(2) as a delegation of federal power 21

C. Congress has constitutional authority to restore aspects of sovereignty lost by Tribes by virtue of their dependent status, including the sovereign power to prosecute non-member Indians 22
1. Congress's plenary authority over Tribes permits the restoration of the tribal sovereign power to prosecute non-member Indians 23
2. *Duro* does not suggest that the scope of tribal criminal jurisdiction is fixed in the Constitution and cannot be altered by Congress 26
3. Congress has been recognized to have the authority in other contexts to remove impediments to the exercise of sovereign power without delegating federal power 32

D. Congress's recognition of the tribal sovereign power to prosecute non-member Indians does not violate the Due Process Clause of the Fifth Amendment 34

TABLE OF CONTENTS—Continued: Page

1. Congress may legislate distinct rules governing Tribes and tribal members, and Congress validly did so in amended Section 1301(2) 35
2. Tribal prosecution of non-member Indians under amended Section 1301(2) does not infringe due process rights 39

II. The Double Jeopardy Clause would not bar the United States from prosecuting respondent, even if Congress could not constitutionally restore the Tribe's power to prosecute him 43

Conclusion 45
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) 8
Alaska v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1988) 22
Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) 22
Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 41
Board of County Comm'rs v. *Seber*, 318 U.S. 705 (1943) 23
Brendale v. *Confederated Yakima Indian Nation*, 492 U.S. 408 (1989) 24
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 27
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 22
Duro v. *Reina*, 495 U.S. 676 (1990) ..... *passim*
Fisher v. *District Court*, 424 U.S. 382 (1976) 35, 36
Foley v. *Connelie*, 435 U.S. 291 (1978) 40

Cases—Continued: Page

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 35
George Moore Ice Cream Co. v. *Rose*, 289 U.S. 373 (1933) 22
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 41
Grafton v. *United States*, 206 U.S. 333 (1907) 13, 43
Heath v. *Alabama*, 474 U.S. 82 (1985) 15, 18
Heckler v. *Mathews*, 465 U.S. 728 (1984) 22
Hillside Dairy Inc. v. *Lyons*, 123 S. Ct. 2142 (2003) 32
Kepner v. *United States*, 195 U.S. 100 (1904) 43-44
Lake Country Estates, Inc. v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979) 33
Moe v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976) 35
Montana v. *United States*, 450 U.S. 544 (1981) 24, 25
Morton v. *Mancari*, 417 U.S. 535 (1974) 23, 35
Negonsott v. *Samuels*, 507 U.S. 99 (1993) 3, 4, 22
Nevada v. *Hicks*, 533 U.S. 353 (2001) 24
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 3, 5, 16, 17, 27, 28, 39
Pero, Ex parte, 99 F.2d 28 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939) 6
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946) 32
Puerto Rico v. *Shell Co.*, 302 U.S. 253 (1937) 15
Rutledge v. *United States*, 517 U.S. 292 (1996) 20
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 22, 23
Serfass v. *United States*, 420 U.S. 377 (1975) 43
South Dakota v. *Bourland*, 508 U.S. 679 (1993) 24, 26
State v. *Hook*, 476 N.W.2d 565 (N.D. 1991) 5
State v. *Marek*, 736 P.2d 1314 (Idaho 1987) 33
Sugarman v. *Dougall*, 413 U.S. 634 (1973) 40
Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Eng'g*, 476 U.S. 877 (1986) 23-24
United States v. *Antelope*, 430 U.S. 641 (1977) 6, 35, 36

Cases—Continued: Page

United States v. *Ball*, 163 U.S. 662 (1896) 44
United States v. *Enas*, 255 F.3d 662 (9th Cir. 2001), cert. denied, 534 U.S. 1115 (2002) 2
United States v. *Kagama*, 118 U.S. 375 (1886) 4, 16, 23
United States v. *Lanza*, 260 U.S. 377 (1922) 15
United States v. *Long*, 324 F.3d 475 (7th Cir. 2003), cert. denied, No. 02-1801 (Oct. 6, 2003) 26
United States v. *Mazurie*, 419 U.S. 544 (1975) 24, 25, 43
United States v. *McBratney*, 104 U.S. 621 (1882) 4
United States v. *Phelps*, 168 F.3d 1048 (8th Cir. 1999) 44
United States v. *Sandoval*, 231 U.S. 28 (1913) 23
United States v. *Wheeler*, 435 U.S. 313 (1978) 5, 7, 11, 15, 16, 21, 24, 28
Waller v. *Florida*, 397 U.S. 387 (1970) 15
Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 35
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979) 22
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 23
Yu Cong Eng v. *Trinidad*, 271 U.S. 500 (1926) 22

Constitution, treaties, statutes and regulation:

U.S. Const.:
Art. I:
§ 8 33
§ 8, Cl. 3 (Commerce Clause) 23, 32
§ 10, Cl. 3 (Interstate Compact Clause) 33
Art. II, § 2, Cl. 2 23
Amend. IV 39
Amend. V 2, 14, 39
Double Jeopardy Clause ..... *passim*
Due Process Clause 34
Amend. VI 39
Amend. VIII 39

Treaties, statutes and regulation—Continued: Page

Treaty with the Cherokee, Nov. 28, 1785, Art. V, 7 Stat. 18 29
Treaty with the Cherokee, Aug. 7, 1790, Art. VIII, 7 Stat. 39 28-29
Treaty with the Chickasaw, Jan. 10, 1786, Art. IV, 7 Stat. 24 29
Treaty with the Choctaw, Jan. 3, 1786, Art. IV, 7 Stat. 21 29
Treaty with the Creeks, Aug. 7, 1790, Art. VI, 7 Stat. 35 29
Treaty with the Wyandot, Jan. 21, 1785, Art. V, 7 Stat. 16 29
Act of May 31, 1946, ch. 279, 60 Stat. 229 5
Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 ..... 4, 38
Act of Nov. 5, 1990, Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892 6
Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 6
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* 2
25 U.S.C. 1301-1303 ..... 2, 1a-3a
25 U.S.C. 1301(2) ..... *passim*
25 U.S.C. 1301(4) 6
25 U.S.C. 1302 ..... 34, 39, 1a
25 U.S.C. 1302(7) 20
25 U.S.C. 1303 ..... 42, 3a
25 U.S.C. 1321 4
Indian Major Crimes Act, 18 U.S.C. 1153 ..... 4, 5, 6, 15, 30, 35, 36
Indian Reorganization Act, 25 U.S.C. 476 36
Indian Tribal Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 103, 114 Stat. 2778 (25 U.S.C. 3363) 41
18 U.S.C. 111(a) 3, 20

Statutes and regulation—Continued: Page

18 U.S.C. 111(a)(1) 7, 8, 14
18 U.S.C. 111(b) 20
18 U.S.C. 1151 3
18 U.S.C. 1152 ..... 3, 4, 34
18 U.S.C. 1161 25
18 U.S.C. 1162 4
22 U.S.C. 1394 33
25 U.S.C. 476 36
25 U.S.C. 903-903f 26
28 U.S.C. 1291 8
28 U.S.C. 1360 4
42 U.S.C. 1983 33
Proclamation No. 2695, 60 Stat. 1352 33

Miscellaneous:

137 Cong. Rec. (1991):
p. 9445 40
p. 9446 19
pp. 10,712-10,714 19
p. 10,713 19
1 Vine Deloria, Jr. & Raymond J. DeMallie, *Treaties Between Indian Nations: Treaties, Agreements, and Conventions, 1775-1979* (1999) 29, 30
H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. (1991) 18, 19
H.R. Rep. No. 61, 102d Cong., 1st Sess. (1991) 18, 39, 42
Impact of the Supreme Court's Ruling in Duro *v.* Reina*: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. (1991):
Pt. 1 ..... 37, 39
Pt. 2 ..... 31, 37, 40, 41, 42
2 Op. Att'y Gen. 693 (1834) 44
17 Op. Att'y Gen. 566 (1883) 30, 31
Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Trial Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479 (2000) 42

Miscellaneous—Continued: Page

S. Rep. No. 168, 102d Cong., 1st Sess. (1991) 19, 37, 38
The Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing Before the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. (1991) 28, 31, 32, 40

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a- 22a) is reported at 324 F.3d 635. The vacated panel opinion (Pet. App. 23a-34a) is reported at 294 F.3d 1004. The opinion of the district court (Pet. App. 35a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2003. On June 13, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 22, 2003, and the petition was filed on that date. The petition for a writ of certiorari was granted on September 30, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Sections 1301 through 1303 of Title 25 of the United States Code are reproduced in the Appendix to this brief at 1a-3a.

STATEMENT

In *Duro* v. *Reina*, 495 U.S. 676 (1990), this Court held that Indian Tribes no longer possessed the inherent authority to enforce their criminal laws against members of other Tribes. In response to that decision, Congress amended the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, to "recognize[] and affirm[]" Tribes' "inherent power * * * to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). This case concerns whether, in light of that amendment, a Tribe acts as a sovereign when it prosecutes a member of another Tribe, as the Ninth Circuit held in *United States* v. *Enas*, 255 F.3d 662 (2001) (en banc), cert. denied, 534 U.S. 1115 (2002), or whether a Tribe acts as an instrumentality of the United States, as

the Eighth Circuit held here. The resolution of that question determines whether successive prosecutions by a Tribe and by the United States for an offense with the same elements is permissible under the Double Jeopardy Clause of the Fifth Amendment.

1. As this Court has observed, "[c]riminal jurisdiction over offenses committed in 'Indian country' 'is governed by a complex patchwork of federal, state, and tribal law.'" *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993) (quoting *Duro*, 495 U.S. at 680 n.1); see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Whether a crime committed in Indian country may be prosecuted by the United States, the State, or the Tribe depends, among other things, on the nature of the crime, the identities of the perpetrator and the victim, and the existence of specific statutory or treaty provisions addressing the subject.[1]

The United States may prosecute federal crimes of nationwide applicability—such as assault on a federal officer, 18 U.S.C. 111(a), the offense involved in this case—to the same extent in Indian country as elsewhere. For federal offenses that are not of nationwide applicability, federal authority to prosecute crimes involving Indians in Indian country is governed primarily by two statutes. The Indian Country Crimes Act, 18 U.S.C. 1152, provides that the federal criminal laws that apply in enclaves under exclusive federal jurisdiction apply within Indian country with certain exceptions. Section 1152 does not authorize federal

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[1] "Indian country" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," "all dependent Indian communities within the borders of the United States," and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. 1151.

prosecution of offenses committed by one Indian against the person or property of another Indian. Nor does Section 1152 authorize federal prosecution when the Indian offender has previously been punished under tribal law. The Indian Major Crimes Act, 18 U.S.C. 1153, enumerates 14 offenses that, if committed by an Indian in Indian country, are subject to the same laws and penalties that apply in areas of exclusive federal jurisdiction, whether or not the victim is an Indian and whether or not the defendant has been punished by the Tribe.

State authority to prosecute crimes involving Indians in Indian country is generally preempted as a matter of federal law. See, *e.g.*, *Negonsott*, 507 U.S. at 103; *United States* v. *Kagama*, 118 U.S. 375, 384 (1886). States, however, possess jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. See *United States* v. *McBratney*, 104 U.S. 621 (1882). Congress has plenary authority to alter the balance of federal and state criminal jurisdiction in Indian country, *Negonsott*, 507 U.S. at 103, and has done so with respect to some States. Public Law 280 granted a number of States the authority to exercise general criminal jurisdiction over Indians in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. See Pub. L. No. 83-280, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360; see also 25 U.S.C. 1321 (procedure for additional States to assume jurisdiction). In addition, Congress has enacted specific statutes authorizing a State to exercise criminal jurisdiction concurrently with the United States over Indians in some or all Indian country within the State.[2]

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[2] For example, Congress has authorized North Dakota to exercise criminal jurisdiction concurrently with the United States over Indians on the Spirit Lake Nation Reservation (formerly the Devil's Lake Indian Reservation), the site of the events that gave rise to the federal and tribal prosecutions at issue in this case. See Act of May 31, 1946, ch. 279, 60 Stat. 229; *State* v. *Hook*, 476 N.W.2d 565 (N.D. 1991).

This Court has held that Tribes have the power, by virtue of their retained inherent sovereignty, to prosecute their own members for violations of tribal law, so that a tribal member may be prosecuted by the United States and by his Tribe for an offense with the same elements. *United States* v. *Wheeler*, 435 U.S. 313, 323-324 (1978). The Court has also held, however, that Tribes were divested of their inherent power to prosecute non-Indians, and thus are precluded from bringing such prosecutions unless authorized to do so by Congress. *Oliphant*, 435 U.S. at 206-212. In *Duro*, 495 U.S. at 687-688, the Court further held that Tribes were divested of their inherent power to prosecute Indians who are members of other Tribes, sometimes referred to as "nonmember Indians," *id.* at 696

Duro created a potentially significant jurisdictional gap in law enforcement in Indian country. It appeared possible that neither the United States, nor the State, nor the Tribe could exercise jurisdiction if the putative Indian defendant was a member of another Tribe, the offense was not among the major crimes enumerated in 18 U.S.C. 1153 (or a generally applicable federal crime) and the victim was another Indian, and Congress had not authorized the State to exercise such jurisdiction. The *Duro* Court acknowledged that issue, 495 U.S. at 697-698, but reasoned that it was for Congress, "which has the ultimate authority over Indian affairs," to provide a solution, if needed, *id.* at 698.

Congress quickly closed that jurisdictional gap by amending the Indian Civil Rights Act to authorize Tribes to exercise criminal jurisdiction over "all Indians." See Pub. L. No. 101-511, Title VIII, § 8077, 104 Stat. 1892, 25 U.S.C. 1301(2); see also Pub. L. No. 102-137, § 1, 105 Stat. 646 (permanently enacting the amendment, which was originally effective only through September 30, 1991). In pertinent part, the amendment expanded the Indian Civil Rights Act's definition of Tribes' "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The amendment also defined "Indian" to mean any person who would be subject to federal criminal jurisdiction as an "Indian" for purposes of 18 U.S.C. 1153. 25 U.S.C. 1301(4).[3]

2. Respondent is an enrolled member of the Turtle Mountain Band of Chippewa Indians, which governs a reservation in north-central North Dakota. The events that gave rise to respondent's tribal and federal prosecutions occurred on the Spirit Lake Nation Reservation, which is governed by the Spirit Lake Nation Tribe

[3] A person is subject to criminal jurisdiction as an "Indian" under 18 U.S.C. 1153 if he, like respondent, is an enrolled member of a federally recognized Tribe. *United States* v. *Antelope*, 430 U.S. 641, 646-647 n.7 (1977). In *Antelope*, the Court noted that some lower courts had concluded that tribal enrollment was not "an absolute requirement of federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon,'" but the Court did not itself express a view on whether such defendants were properly subject to federal jurisdiction under Section 1153. *Ibid.* (quoting *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939)).

and which is located in northeastern North Dakota. Pet. App. 2a.

On June 13, 2001, police officers of the Bureau of Indian Affairs (BIA) arrested respondent for public intoxication on the Spirit Lake Nation Reservation. When the BIA officers reminded respondent that he was subject to an order excluding him from that reservation, respondent struck one of the officers with his fist. Pet. App. 2a, 23a.

Respondent pleaded guilty in the Spirit Lake Nation tribal court to three violations of the Spirit Lake Nation tribal code, consisting of violence against a police officer, resisting arrest, and public intoxication. He was sentenced to 90 days of imprisonment for the first of those offenses. Pet. App. 36a; Gov't C.A. Supp. Br. 2.

3. On August 29, 2001, respondent was indicted in the United States District Court for the District of North Dakota for assault on a federal officer, in violation of 18 U.S.C. 111(a)(1). The charge involved the same attack on the BIA police officer that was the subject of the tribal charge. Respondent consented to proceeding before a magistrate judge. Pet. App. 35a.

Respondent moved to dismiss the indictment on, *inter alia*, double jeopardy grounds. The government did not dispute that the tribal assault charge and the federal assault charge involved the same elements, so that successive tribal and federal prosecutions would be permissible under the Double Jeopardy Clause only if they were brought by separate sovereigns. See, *e.g.*, *Wheeler*, 435 U.S. at 316-319 (applying the dual sovereignty doctrine to successive tribal and federal prosecutions of a tribal member).

The magistrate judge rejected respondent's double jeopardy claim that he was being prosecuted twice by

the same sovereign. Pet. App. 37a-40a. The magistrate judge recognized that "the dual sovereignty doctrine applies only when the prosecuting entities derive their prosecutorial powers from independent sources." *Id.* at 37a. The magistrate judge found that requirement to be satisfied in this case, reasoning that the United States and the Tribe each exercises its own sovereign authority in prosecuting a member of another Tribe. See *id.* at 40a. The magistrate judge explained that the post-*Duro* amendment to Section 1301(2) is "a valid recognition of inherent rights of Indian tribes," not a delegation of the United States' own prosecutorial power to Tribes. *Id.* at 40a.

Respondent conditionally pleaded guilty to the violation of 18 U.S.C. 111(a)(1), preserving his double jeopardy claim as well as a selective prosecution claim. He took an interlocutory appeal before sentencing. Pet. App. 35a-36a.[4]

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[4] This Court has held that pretrial orders denying motions to dismiss indictments on double jeopardy grounds are "final decisions," within the meaning of 28 U.S.C. 1291, and thus are immediately appealable. *Abney* v. *United States*, 431 U.S. 651, 656-662 (1977). In classifying such orders as within the "small class of cases" that are "beyond the confines of the final-judgment rule," the Court explained that they "constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim," are "collateral to, and separable from, the principal issue at the accused's impending criminal trial," and involve rights that cannot be fully vindicated on an appeal following a final judgment. *Id.* at 659-660. Here, in contrast to the ordinary case in which a defendant takes a collateral order appeal from a pretrial order rejecting a double jeopardy claim, respondent took an appeal only after jeopardy had attached in the second prosecution. That choice does not appear to affect the finality of the order for purposes of Section 1291.

4. A divided panel of the court of appeals affirmed. Pet. App. 23a-28a.

The panel concluded that the Double Jeopardy Clause did not require the dismissal of the federal prosecution, because the tribal prosecution and the federal prosecution were brought by different sovereigns. Pet. App. 27a The panel recognized that this Court's decision in *Duro* held that Tribes no longer had the inherent sovereign power to prosecute members of other Tribes. *Id.* at 25a. The panel reasoned, however, that *Duro* was grounded on federal common law, not on any constitutional limitation on tribal sovereignty. *Id.* at 26a-27a. Accordingly, the panel concluded that Congress could modify the federal common law as reflected in *Duro*, and that Congress did so by amending the Indian Civil Rights Act to "recognize[] inherent tribal power." *Id.* at 27a.[5]

Chief Judge Hansen dissented. Pet. App. 28a-34a. He reasoned that the authority for the tribal prosecution and the federal prosecution derived from a single source—"the legislative authority of the federal Congress exercising, with the President's approval, the power of the United States." *Id.* at 34a. He concluded that "[t]he dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable." *Ibid.*

5. After granting rehearing en banc, the court of appeals reversed and remanded with directions to dismiss the indictment. Pet. App. 1a-11a.

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[5] The panel, like the magistrate judge, also rejected respondent's claim that the United States had engaged in impermissible selective prosecution based on race. Pet. App. 27a-28a; see *id.* at 40a-42a. The en banc court did not address that claim.

a. The court of appeals recognized that respondent's double jeopardy claim turned on whether the United States and the Tribe "exercised authority derived from the same ultimate source of power" in prosecuting him. Pet. App. 4a. The court concluded that a Tribe does not exercise its own sovereign power when it prosecutes a member of another Tribe as authorized by 25 U.S.C. 1301(2), relying on *Duro*'s holding that, "[i]n the area of criminal enforcement," a Tribe's retained sovereign power "does not extend beyond internal relations among members." Pet. App. 6a (quoting *Duro*, 495 U.S. at 688).

The court of appeals rejected the panel's characterization of *Duro* as "a common law decision that Congress had the power to override via the [Indian Civil Rights Act] amendments." Pet. App. 8a. The court instead "conclude[d] that the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." *Ibid.* "Once the federal sovereign divests a tribe of a particular power," the court reasoned, "it is no longer an inherent power and it may only be restored by delegation of Congress's power." *Ibid.*

The court of appeals concluded, however, that it "need not construe the [Indian Civil Rights Act] amendments as a legal nullity." Pet. App. 10a. Rather, choosing to give effect to Congress's intent "to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians," the court interpreted amended Section 1301(2) as delegating federal power to Tribes. *Ibid.* Accordingly, the court held that, because respondent was "necessarily prosecuted pursuant to that delegated [federal] power," the "dual sovereignty doctrine does not apply," and the prosecution brought

by the United States was barred by the Double Jeopardy Clause. *Id.* at 11a.

b. Judge Morris Sheppard Arnold, joined by three other members of the court, dissented. Pet. App. 11a-22a.

Judge Arnold understood this Court's decision in *Duro* to be based not on the Constitution, but on federal common law. Pet. App. 11a. He reasoned that the post-*Duro* amendment to the Indian Civil Rights Act is a permissible exercise of Congress's "plenary legislative power over federal common law in general and Indian affairs in particular to define the scope of inherent Indian sovereignty." *Ibid.* Accordingly, he concluded that, "[b]ecause the Spirit Lake Nation, in trying [respondent], was simply exercising its own sovereignty, and not a power that Congress delegated to it, [respondent's] double jeopardy rights were not violated." *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment is not violated when a defendant is prosecuted by separate sovereigns for offenses that contain the same elements. As this Court has recognized, therefore, both the United States and an Indian Tribe may prosecute a member of that Tribe for such an offense, because each exercises its own sovereign power in doing so. *United States* v. *Wheeler*, 435 U.S. 313 (1978). The same rule applies when a tribal member is prosecuted by both the United States and by a Tribe other than his own pursuant to the power recognized in 25 U.S.C. 1301(2). The tribal prosecution involves an exercise of a restored sovereign power that predates the Constitution and laws of the United States and that derives from a source independent of them.

Section 1301(2) can be understood only as a restoration to Tribes of the sovereign power that *Duro* v. *Reina*, 495 U.S. 676 (1990), held that they had lost as a result of their dependent status. Section 1301(2), by its terms, defines Tribes' "powers of self-government" to include "the inherent power * * * to exercise criminal jurisdiction over all Indians." A power that is "inherent" and exercised as an aspect of "self-government" is necessarily a sovereign power. The congressional reports and floor statements confirm that Congress's intent was to recognize a tribal sovereign power. To construe Section 1301(2) instead as a delegation of federal power would undermine Congress's purpose of protecting reservation communities against crimes committed by non-member Indians. That is because a tribal prosecution of a non-member Indian, in which only misdemeanor-type penalties could be imposed, then would bar a federal prosecution for an offense with the same elements, including a greater-encompassing offense. The court of appeals thus erred in rewriting Section 1301(2), contrary to its text, history, and purpose, as a delegation of federal power to Tribes.

The court of appeals also erred in concluding that the Constitution barred Congress from restoring Tribes' sovereign power to prosecute members of other Tribes. Congress has plenary authority under the Constitution to legislate with respect to Tribes and tribal Indians, including the authority to expand or contract the scope of tribal powers of self-government. Section 1301(2) does not, on its face or as applied in this case, violate the constraints imposed on Congress by the Fifth Amendment's Due Process Clause, including its equal protection component. Congress can constitutionally single out all tribal members, as a political group, for

unique burdens or benefits, so long as it has a rational basis for doing so, as it did here in seeking to close a jurisdictional gap in Indian country law enforcement and to strengthen tribal self-government. The Indian Civil Rights Act entitles defendants in tribal court to most of the same protections to which defendants are entitled in state court under the Due Process Clause. And, although the Indian Civil Rights Act does not guarantee certain protections such as appointed counsel in cases involving incarceration, tribal prosecutions can be, and often are, conducted consistently with those protections. Respondent has not identified any such protection that was denied him in tribal court.

Even if Congress could not constitutionally restore Tribes' sovereign power to prosecute non-member Indians, respondent's double jeopardy challenge would fail. If the Tribe did not have criminal jurisdiction over respondent, then jeopardy never attached in his prosecution in tribal court, for "before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged." *Grafton* v. *United States*, 206 U.S. 333, 345 (1907). The tribal prosecution could not, therefore, bar respondent's subsequent prosecution by the United States.

ARGUMENT

THE UNITED STATES IS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT FROM PROSECUTING RESPONDENT FOR A FEDERAL OFFENSE THAT CONTAINS THE SAME ELEMENTS AS THE TRIBAL OFFENSE FOR WHICH HE WAS PREVIOUSLY PROSECUTED

I. THE DOUBLE JEOPARDY CLAUSE PERMITS THE UNITED STATES AND AN INDIAN TRIBE, AS SEPARATE SOVEREIGNS, TO PROSECUTE A NON-MEMBER INDIAN FOR CRIMES THAT CONTAIN THE SAME ELEMENTS

The United States is not precluded by the Double Jeopardy Clause from prosecuting respondent for assault on a federal officer, in violation of 18 U.S.C. 111(a)(1), even though respondent had previously been prosecuted by a Tribe other than his own for an offense with the same elements. That is because the Tribe, in exercising the criminal jurisdiction over "all Indians" recognized in 25 U.S.C. 1301(2), was acting as a sovereign, not as an instrumentality of the United States. Section 1301(2), as its text, history, and purpose make clear, was designed to restore Tribes' sovereign power to punish violations of their laws by members of other Tribes. Nothing in the Constitution prevents Congress from restoring that sovereign power.

A. The Double Jeopardy Clause Has No Application To Prosecutions By Separate Sovereigns

The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The dual sovereignty doctrine permits prosecutions by separate sovereigns for offenses with the same ele-

ments, because violations of the laws of separate sovereigns are not the "same offence" for purposes of the Double Jeopardy Clause. See *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'").

"In applying the dual sovereignty doctrine," this Court has explained, "the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns"—that is, "whether the two entities draw their authority to punish the offender from distinct sources of power." *Heath*, 474 U.S. at 88. Applying that analysis, the Court has held that the United States and a State are separate sovereigns, see *United States* v. *Lanza*, 260 U.S. 377, 382 (1922), as are two States, see *Heath*, 474 U.S. at 89-90. In contrast, the United States is not a sovereign separate from its territories and possessions, see *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 264-265 (1937), and a State is not a sovereign separate from its municipalities, see *Waller* v. *Florida*, 397 U.S. 387, 393 (1970).

In *Wheeler*, this Court considered whether the United States could prosecute a member of the Navajo Nation for statutory rape, one of the major crimes enumerated in 18 U.S.C. 1153, after he had been prosecuted by the Navajo Nation for the lesser included offense of contributing to the delinquency of a minor. The Court reasoned that the issue turned on the ultimate "source of [a Tribe's] power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?" 435 U.S. at 322. The Court concluded that, when a

Tribe prosecutes a tribal member for a violation of tribal law, "the tribe acts as an independent sovereign, and not as an arm of the Federal Government," *id.* at 329, and thus that the federal prosecution is permissible under the Double Jeopardy Clause, *id.* at 329-330.

In assessing the scope of Tribes' inherent sovereignty, the *Wheeler* Court explained that Tribes originally possessed "the full attributes of sovereignty," including "the inherent power to prescribe laws for their members and to punish infractions of those laws." 435 U.S. at 322-323 (quoting *United States* v. *Kagama*, 118 U.S. 375, 381 (1886)). In contrast, the Court said, the sovereignty that Tribes retain today "is of a unique and limited character," existing "only at the sufferance of Congress" and "subject to complete defeasance." *Id.* at 323. The Court added, however, that Tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Ibid.* The Court concluded that Tribes' sovereign power to exercise criminal jurisdiction over their own members had not been extinguished by Congress or surrendered incident to their entering into a dependent relationship with the United States. *Id.* at 323-328.

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court distinguished Tribes' criminal jurisdiction over their own members from their criminal jurisdiction over non-Indians. There, the Court declined to recognize an inherent tribal power to prosecute non-Indians, reasoning that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. The Court concluded that Tribes could not exercise such power

absent a "treaty provision or Act of Congress." *Id.* at 196 n.6.

In *Duro*, the Court considered the unresolved issue at the "intersection" of *Wheeler* and *Oliphant*—namely, whether Tribes retained the inherent power to prosecute Indians who are members of other Tribes. 495 U.S. at 684. The Court concluded that its recognition of such an inherent power would be inconsistent with Tribes' dependent status, and it held that a Tribe could not prosecute non-member Indians under the current jurisdictional scheme. "If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement," the Court continued, "then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs." *Id.* at 698.

B. The Post-*Duro* Amendment To The Indian Civil Rights Act Can Only Be Understood As A Restoration Of Tribes' Sovereign Power To Prosecute Violations Of Their Laws By Members Of Other Tribes

In response to this Court's decision in *Duro* and resulting concerns about Indian country law enforcement, Congress amended 25 U.S.C. 1301(2), the provision of the Indian Civil Rights Act that defines the Tribes' "powers of self-government." The amendment states that those powers include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1301(2). The text, history, and purpose of the amendment confirm that it was designed exclusively as a restoration of a tribal sovereign power. The amendment cannot plausibly be construed as a delegation of federal power to Tribes—even if such a construction

would be necessary, as the court of appeals mistakenly perceived, to save it from constitutional invalidity.

1. The text of amended Section 1301(2) speaks of restoring a tribal sovereign power

The text of Section 1301(2), as amended after *Duro*, reflects Congress's intent to authorize Tribes to act as sovereigns, not as instrumentalities of the United States, when prosecuting violations of their laws by members of other Tribes. Criminal jurisdiction exercised by Tribes as a "power[] of *self*-government" necessarily refers to jurisdiction derived from a source of power distinct from the Constitution and laws of the United States. See *Heath*, 474 U.S. at 88. The amendment, moreover, "recognize[s]" and "affirm[s]" the existence of that criminal jurisdiction as an "inherent power of Indian tribes," not a delegation of federal power.

2. The legislative history of amended Section 1301(2) reflects Congress's intent to restore a tribal sovereign power

The legislative history of the post-*Duro* amendment to Section 1301(2) confirms that Congress intended to recognize a tribal sovereign power to prosecute members of other Tribes. The Conference Report, after stating that "tribal governments have always held" the "inherent authority" to "exercise criminal jurisdiction over all Indians on their reservations," explains that the amendment "is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3 (1991). The House Interior and Insular Affairs Committee Report contains similar language. See H.R. Rep. No. 61, 102d Cong., 1st Sess. 7 (1991) (stating that the amendment is "a clarification of

the status of tribes as domestic dependent nations," and "is not a federal delegation"). And the Senate Select Committee on Indian Affairs Report explains that the amendment "recognize[s] and reaffirm[s] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians." S. Rep. No. 168, 102d Cong., 1st Sess. 4 (1991).

During the congressional debates, Members of Congress described the amendment as a restoration of a tribal sovereign power that *Duro* held had been lost, not as a delegation of federal power. For example, Representative Miller, the House floor manager for the amendment, explained that the amendment "recognizes an inherent tribal right which always existed," and "is not a delegation of authority." 137 Cong. Rec. 10,712-10,714 (1991). Representative Richardson, a sponsor of the amendment, described it as "reaffirm[ing]" such tribal power. *Id.* at 10,713. Similarly, Senator Inouye, the Senate floor manager, stated that the amendment's "premise * * * is that the Congress affirms the inherent jurisdiction of tribal governments over nonmember Indians." *Id.* at 9446. No Member of Congress suggested that the amendment would have the effect of making Tribes instrumentalities of the United States in the prosecution of non-member Indians.

3. Congress's purpose to combat crime by non-member Indians demonstrates that amended Section 1301(2) was designed to restore tribal sovereign power

The understanding that the post-*Duro* amendment to Section 1301(2) was intended as a restoration of tribal sovereign power comports with its purpose of preserving "public safety" in Indian country. H.R. Conf. Rep. No. 261, *supra*, at 6. That purpose would be

undermined if the amendment were construed, as the court of appeals construed it, to authorize Tribes to exercise *federal* prosecutorial power over members of other Tribes. In that event, whenever a non-member Indian committed a federal offense in Indian country, a tribal prosecution for an offense with the same elements, including any lesser-included offense, would bar a subsequent federal prosecution. See *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996) (Double Jeopardy Clause bars successive prosecutions for lesser-included and greater-encompassing offenses because they are the "same offence" within the meaning of the Clause).

Although Tribes may prosecute all offenses committed by Indians on their reservations, the punishment for any offense is limited to one year of imprisonment, a $5000 fine, or both. 25 U.S.C. 1302(7). Often, therefore, a tribal prosecution of a non-member Indian, even if successful, could not result in a sentence that adequately vindicates federal interests. Here, for example, the federal offense of assault on an officer of the United States, while carrying misdemeanor penalties when it involves "only simple assault," carries penalties of as much as 20 years of imprisonment if the defendant used a deadly or dangerous weapon or inflicted bodily injury. See 18 U.S.C. 111(a) and (b).

In many instances, a Tribe could be expected to defer its own prosecution of a non-member Indian until the United States decided whether to prosecute. The risk would nonetheless exist that, whether as a result of choice or inadvertence, a tribal prosecution could occur before a decision whether to pursue federal charges had been made. A Tribe may have different law enforcement priorities and objectives than does the United States; for example, a Tribe may perceive that a violation of tribal law is more effectively addressed within the reservation community by measures other than incarceration. A non-member Indian would have a great incentive to enter a prompt plea in a tribal prosecution, thereby gaining protection from federal prosecution. See *Wheeler*, 435 U.S. at 330-331 (noting that, if a Tribe could prosecute its own members only as an instrumentality of the United States, tribal members would have an incentive to plead guilty to tribal offenses to avoid prosecution for federal offenses carrying more severe penalties).

Congress should not be presumed to have intended to incapacitate the United States, in circumstances such as those presented here, from prosecuting violations of its criminal laws by non-member Indians. Rather, the only sensible interpretation of the post-*Duro* amendment, consistent with its text and history, is as a restoration of Tribes' own criminal jurisdiction, not as a delegation of federal criminal jurisdiction to Tribes.

4. Principles of constitutional avoidance do not justify construing amended Section 1301(2) as a delegation of federal power

The court of appeals recognized that Congress intended in the post-*Duro* amendment to Section 1301(2) to restore Tribes' sovereign power to prosecute members of other Tribes. See Pet. App. 6a, 9a-10a. Yet, having concluded (erroneously, as explained below) that the Constitution prevents Congress from restoring tribal sovereign powers that this Court has held were lost, the court of appeals declined to construe the amendment as "a legal nullity." *Id.* at 10a. The court of appeals instead sought to effectuate Congress's "wish[] to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians" by construing Section

1301(2) as a delegation of the United States's power to Tribes. *Id.* at 10a-11a.

That was error. Although courts may "strain to construe legislation so as to save it against constitutional attack," they may not "carry this to the point of perverting the purpose of a statute * * * or judicially rewriting it." *Heckler* v. *Mathews*, 465 U.S. 728, 741-742 (1984) (internal citation and quotation marks omitted); see, *e.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926) ("[I]t is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitations."). Here, "the intention of the Congress is revealed too distinctly to permit [a court] to ignore it," *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933), in the text, history, and purpose of amended Section 1301(2). See pp. 18-21, *supra*. Section 1301(2) must stand or fall, therefore, as a restoration of tribal sovereign power.

C. Congress Has Constitutional Authority To Restore Aspects Of Sovereignty Lost By Tribes By Virtue Of Their Dependent Status, Including The Sovereign Power To Prosecute Non-Member Indians

Congress possesses "plenary and exclusive power" to legislate with respect to Tribes and their members. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979); accord, *e.g.*, *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1988); *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). Such power "is drawn both explicitly and implicitly from the

Constitution itself"—in particular, from its grants to Congress of the power "[t]o regulate Commerce * * * with the Indian Tribes," Art. I, § 8, Cl. 3, and to the President, with the advice and consent of the Senate, of the power to make treaties, Art. II, § 2, Cl. 2. *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974); see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (explaining that the Constitution, "by declaring treaties already made * * * to be the supreme law of the land, * * * admits [the Indian nations'] rank among those powers who are capable of making treaties").

Under these explicit and implicit grants of authority, and as a consequence of the "course of dealing" between the United States and Tribes, *Kagama*, 118 U.S. at 384-385, Congress has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913); see *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). Congress's plenary power over Indian affairs necessarily includes the power to regulate relations among Tribes and tribal Indians. In particular here, it includes the power to furnish needed "protection" to reservation Indian communities by recognizing in Tribes the authority to prosecute members of other Tribes for offenses committed on their reservations.

1. Congress's plenary authority over Tribes permits the restoration of the tribal sovereign power to prosecute non-member Indians

It is well settled that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo*, 436 U.S. at 56; see *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold*

Eng'g, 476 U.S. 877, 891 (1986) (observing that all "aspect[s] of tribal sovereignty" are "subject to plenary federal control and definition"); *Wheeler*, 435 U.S. at 327 ("[I]n the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian tribes, remains subject to ultimate federal control."). The Court has recognized that Congress may permissibly "modify" Tribes' powers of self-government by authorizing the exercise of powers that could not otherwise be exercised as a consequence of Tribes' dependent status.

In *Montana* v. *United States*, 450 U.S. 544 (1981), for example, the Court considered whether Tribes retained the sovereign power to regulate non-Indians' hunting and fishing on lands owned by non-Indians within their reservations. The Court concluded that such an "exercise of tribal power * * * is inconsistent with the dependent status of the tribes, *and so cannot survive without express congressional delegation*." *Id.* at 564 (emphasis added), The Court thus made clear that Congress could remove impediments that would otherwise exist to the exercise of that power. In other cases as well, the Court, while concluding that Tribes no longer possessed the inherent power to regulate certain activities of non-Indians, contemplated that Congress could restore that power to Tribes. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353, 359, 364-366 (2001); *South Dakota* v. *Bourland*, 508 U.S. 679, 695 (1993); *Brendale* v. *Confederated Yakima Indian Nation*, 492 U.S. 408, 428 (1989) (opinion of White, J.); *id.* at 446-447 (opinion of Stevens, J.).

The Court's decision in *United States* v. *Mazurie*, 419 U.S. 544 (1975), reinforces the conclusion that Congress may authorize Tribes to exercise powers that they could not otherwise exercise as a consequence of their

dependent status. There, the Court sustained 18 U.S.C. 1161, which provides that liquor sales in Indian country, including those by non-Indians, can occur only in conformity with any applicable tribal ordinance. See 419 U.S. at 556-558. The Court rejected the argument that Section 1161 exceeds constitutional limitations on Congress's ability to delegate its own legislative power. The Court explained that "[t]hose limitations are * * * less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter"—as do Tribes with regard to "matters that affect the internal and social relations of tribal life," such as "the distribution and use of intoxicants." *Id.* at 556-557. Without deciding whether the sovereign power of a Tribe would be sufficient to support the regulation absent the grant of congressional authority, the Court held that "the independent tribal authority is quite sufficient to protect Congress's decision to vest in tribal councils this portion of its own authority 'to regulate Commerce * * * with the Indian tribes.'" *Id.* at 557.

The Court's use of the term "delegation" in *Montana*, *Mazurie*, and other cases does not imply that a power exercised by Tribes as a result of congressional action can only be a federal power. Those cases did not turn on any distinction between restored tribal power and delegated federal power. Moreover, the Court used the term in *Montana* to encompass action by Congress that restores a "tribal power" that had been divested. See *Montana*, 450 U.S. at 564 (stating that a preempted "tribal power . . . cannot survive without express congressional delegation"). And in *Bourland*, which also concerned whether a Tribe could regulate hunting and fishing on reservation lands that were no longer in Indian hands, the Court noted the potential relevance

of "treaties or statutes" evincing that "Congress intended to allow the Tribe to assert jurisdiction over [certain] lands *pursuant to inherent sovereignty*." 508 U.S. at 695 (emphasis added).[6]

The Court's decisions thus recognize that Congress, in the exercise of its plenary authority over Indian affairs, may expand as well as contract the scope of tribal sovereign powers. Congress permissibly exercised that authority in restoring Tribes' sovereign power to prosecute members of other Tribes.

2. Duro does not suggest that the scope of tribal criminal jurisdiction is fixed in the Constitution and cannot be altered by Congress

The court of appeals reasoned that *Duro*'s articulation of the scope of retained tribal sovereignty was based on the Constitution, and therefore that Congress could not restore the tribal sovereign power that *Duro* held to have been lost. See Pet. App. 4a-9a. The court of appeals' reasoning rested on an erroneous premise.

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[6] On a number of occasions, Congress has acted to restore federal recognition to a Tribe, and thereby enabled the Tribe to exercise sovereign powers that could not be exercised without such recognition. See, *e.g.*, 25 U.S.C. 903-903f (restoring Menominee Tribe's federal recognition and "reinstat[ing] all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to" an earlier withdrawal of recognition). As the Seventh Circuit recently held, after such a restoration of federal recognition, a Tribe exercises its own sovereign power in prosecuting a tribal member, so that a subsequent prosecution by the United States for an offense with the same elements does not violate the Double Jeopardy Clause. *United States* v. *Long*, 324 F.3d 475, 483 (7th Cir. 2003) ("Congress had the power to undo by legislation that which it had accomplished by legislation—restoring to the Menominee the inherent sovereign power that it took from them in 1954."), cert. denied, No. 02-1801 (Oct. 6, 2003).

Duro was a federal common law decision, not a constitutional one.

a. The Constitution does not address the extent to which Tribes retain sovereign powers after their incorporation into the United States. From the early years of this Nation, tribal sovereignty has been understood to be subject to adjustment by federal treaties and statutes. To the extent that Congress has not spoken directly to the issue, tribal sovereignty has been treated as a matter of federal common law. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16-19 (1831) (Marshall, C.J.); see also *Oliphant*, 435 U.S. at 206 (observing that "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress," which "beyond their actual text form the backdrop for the intricate web of judicially made Indian law").

This Court's decision in *Duro* thus did not rest on any provision of the Constitution. As the dissenting judges in the court of appeals explained, "the Supreme Court in [*Duro*] did not base its decision on the Constitution, nor did the Constitution require the result that the Court reached there." Pet. App. 11a (Morris Sheppard Arnold, J., dissenting). "The result in that case was instead based on federal common law," *ibid.*, as informed by various non-constitutional sources, including statutes, treaties, and federal court practice. See 495 U.S. at 688-692.

Accordingly, Congress was not constitutionally precluded from altering the result of the *Duro* decision by prospectively restoring to Tribes the sovereign power to prosecute non-member Indians. Indeed, both *Duro* and *Oliphant* suggest that the scope of tribal criminal jurisdiction articulated in those cases could be modified by future congressional action. See *Duro*, 495

U.S. at 698; *Oliphant*, 435 U.S. at 212; cf. *Wheeler*, 435 U.S. at 328 n.28 ("[W]e do not mean to imply that a tribe which was deprived of [criminal jurisdiction] * * * and then regained it by Act of Congress would necessarily be an arm of the Federal Government.").

b. The conclusion that this Court's holding in *Duro* was not compelled by the Constitution is reinforced by the historical fact that Tribes exercised criminal jurisdiction over members of other Tribes well after the ratification of the Constitution. As Congress was informed during its consideration of the legislation at issue here, "[i]n the period from the founding of the Republic until the latter part of the last [*i.e.*, nineteenth] century," "[t]ribes exercised authority over members of other tribes who married into the tribe, were adopted into its families, or otherwise became part of the tribal community voluntarily," as well as "members of other tribes who voluntarily came to visit or to trade." *The* Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing Before the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. 155 (1991) (*House Hearing*), (statement of Richard Collins, law faculty, University of Colorado).[7]

During the period surrounding the ratification of the Constitution, the United States entered into a number of treaties authorizing Tribes to "punish * * * or not, as they please," "any citizen of the United States, or other person not being an Indian" who settled on tribal lands. Treaty with the Cherokee, Aug. 7, 1790, Art.

[7] Much of the historical material discussed in this subsection was not presented to the Court in *Duro*.

VIII, 7 Stat. 39.[8] That those treaties made no mention of the Tribe's authority to punish Indians who were members of other Tribes (and who generally were not United States citizens at that time) implies that such authority was unquestioned.

Several agreements entered into among Tribes during the nineteenth century recognized those Tribes' authority to prosecute all Indians within their territory. In 1886, after certain eastern Tribes had been removed to the Indian Territory, those Tribes entered into a compact that provided, *inter alia*, that "[i]f a citizen of one Nation commits wilful murder, or other crime within the limits of another Nation, party hereto, he shall be subject to the same treatment as if he were a citizen of that Nation." Compact of the Five Civilized Tribes, Mar. 15, 1886, Sec. 4, *reprinted in* 1 Vine Deloria, Jr. & Raymond J. DeMallie, *Treaties Between Indian Nations: Treaties, Agreements, and Conventions, 1775-1979*, at 742 (1999) (*Indian Treaties*). Virtually identical provisions appeared in at least two earlier tribal compacts. See Compact Between the Cherokee, Creek, Chickasaw, and Seminole, Nov. 8-15, 1859, Art. 4, *Indian Treaties*, 739; Compact Between the Cherokee, Creek, and Osage, July 3, 1843, Sec. 5, *Indian Treaties*, 737; see also Treaty Between the Osage and the Delaware, Shawnee, Kickapoo, Wea, Piankeshaw, and Peoria, Oct. 7, 1826, Art. 3, *Indian Treaties*, 693 (providing that members of one Tribe would not hunt on land in the State of Missouri and the

[8] See Treaty with the Creeks, Aug. 7, 1790, Art. VI, 7 Stat. 35; Treaty with the Chickasaw, Jan. 10, 1786, Art. IV, 7 Stat. 24; Treaty with the Choctaw, Jan. 3, 1786, Art. IV, 7 Stat. 21; Treaty with the Cherokee, Nov. 28, 1785, Art. V, 7 Stat. 18; Treaty with the Wyandot, Jan. 21, 1785, Art. V, 7 Stat. 16.

Territory of Arkansas reserved for the other Tribe "under the penalty of any injury they may receive on said reservation").[9]

A Tribe's authority to exercise criminal jurisdiction over members of other Tribes was acknowledged by the Attorney General in an 1883 opinion, which concluded that the United States did not have the authority under a treaty with the Arapahoe Tribe to prosecute an alleged murder of an Arapahoe Indian by a Creek Indian within the territory of the Pottawatomie Tribe. 17 Op. Att'y Gen. 566.[10] The Attorney General observed that a federal prosecution of the offense would constitute a departure from "the United States * * * general policy" of leaving to Tribes the "redress of offenses committed by members of other tribes." *Id.* at 568. Although the Pottawatomie did not have a law that allowed it to prosecute the crime, the Attorney General suggested that either the Arapahoe, the Tribe of the victim, or the Creek, the Tribe of the accused,

[9] Agreements sometimes specified other means of addressing crimes committed by a member of one Tribe within the territory of another Tribe. See, *e.g.*, Treaty Between the Creek and Osage, May 10, 1831, Art. 2d, *Indian Treaties*, 698 (providing that a member of one Tribe who was accused of "Murder, or Capital offense" against a member of the other Tribe would "be brought before a council of at least ten Chiefs of each nation to be punished agreeable to their decision"); Treaty Between the Creek and Cherokee, Dec. 11, 1821, Arts. 8-9, *Indian Treaties*, 688-689 (providing that "[i]f any Cherokee should come over the lines & commit murder or theft to the Creeks, the Creeks will make a demand of the Cherokees for satisfaction," and that "[i]f any Creeks should come over the line & commit murder or theft to the Cherokees, the Cherokees will make a demand of the Creeks for satisfaction").

[10] The opinion predated the enactment of the Indian Major Crimes Act. See p. 4, *supra*.

might have a law that would allow it to do so. *Id.* at 570.

A substantial body of evidence presented to Congress confirms Tribes' exercise of criminal jurisdiction over all Indians within their territory well after the ratification of the Constitution. Indeed, a number of tribal leaders testified that their Tribes had continuously until *Duro* exercised criminal jurisdictionover members of other Tribes.[11]

[11] See, *e.g.*, *Impact of the Supreme Court's Ruling in* Duro *v.* Reina: *Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. Pt. 2, at 36 (1991) (*Senate Hearing 2*) (statement of Lawrence D. Wetsit, Chairman, Fort Peck Tribal Executive Board) ("The Fort Peck Assiniboine and Sioux Tribes have historically always enjoyed jurisdiction over nonmember Indians on our reservation."); *id.* at 55 (statement of Harry Smiskin, Tribal Council Member, Yakima Indian Nation) ("[H]istorically, Indians from the entire Northwest came to trade and do business with the Yakima Nation. They were welcome on our lands, and at no time in history has any Indian ever indicated that he should be immune from our tribe's jurisdiction, be it in the historical traditional manner or the more Anglo-type and style of criminal justice now practiced by our courts."); *id.* at 62 (statement of Robert Lewis, Governor, Pueblo of Zuni) ("We have exercised jurisdiction over non-Zuni Indians for over 450 years within the legal framework of Spain, Mexico, and the United States."); *id.* at 185-186 (statement of The Cheyenne River Sioux Tribe) (describing incident in which Cheyenne authorities punished a violation of Cheyenne law by Sioux who were living among the Cheyenne); *House Hearing* 94 (statement of Michael T. Pablo, Chairman, Confederated Salish and Kootenai Tribes) ("Historically, the Confederated Salish and Kootenai Tribes have always exercised criminal jurisdiction over" members of other Tribes, whether they permanently resided on the Tribes' reservation or visited for ceremonies and other events.); *id.* at 102 (statement of Zane Jackson, Chairman, Warm Springs Tribal Council) ("From the time the Warm Springs Reservation was first established by the Treaty of June 25, 1855, our people have exer-

3. Congress has been recognized to have the authority in other contexts to remove impediments to the exercise of sovereign power without delegating federal power

In other contexts as well, Congress has been recognized to possess the ability to restore, or to remove impediments to the exercise of, sovereign powers derived from a source of authority independent of the Constitution and laws of the United States.

For example, although the Commerce Clause operates as a constraint on the States' sovereign power to regulate interstate commerce occurring within their borders, Congress may authorize States to exercise that power in a manner that the Commerce Clause would otherwise forbid. See *Hillside Dairy Inc.* v. *Lyons*, 123 S. Ct. 2142, 2147 (2003) ("Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce."). In regulating commerce pursuant to such a congressional authorization, a State exercises its own sovereign power, not delegated federal power. See *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 437-438 (1946) (concluding that, when a State imposes taxes in the exercise of its congressionally authorized power to tax insurance, the State is not subject to the requirement of

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cised jurisdiction over Indians from other tribes who came to visit or live on our reservation. Even before the reservation was created, it was always the traditional law of our people that Indians from other tribes who came into our sovereign territory were subject to our laws."); *id.* at 178 (statement of Donna M. Christensen, Attorney General, Navajo Nation) ("The Navajo people have interacted with other tribes from the beginning of our history. Not surprisingly, the Navajo people, like other tribes, have always exercised what is known as criminal jurisdiction over nonmember Indians when necessary.").

Article I, Section 8, of the Constitution that federal excise taxes be uniform throughout the United States).

Similarly, the Interstate Compact Clause prevents States from exercising the sovereign power to enter into compacts with one another without the consent of Congress, see U.S. Const. Art I, § 10, Cl. 3. When Congress has consented to such compacts, however, States implement them as an exercise of state power, not delegated federal power. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 398-400 (1979) (action of agency formed under congressionally approved interstate compact was state action under 42 U.S.C. 1983). And, when Congress authorizes States to exercise the otherwise preempted power to prosecute Indians for offenses in Indian country, a State exercises its own sovereign power in doing so, not delegated federal power. See *State* v. *Marek*, 736 P.2d 1314, 1319 (Idaho 1987).

So, too, although a nation that has been made a territory or possession of the United States may be precluded from exercising any sovereign powers, Congress may restore the nation's sovereignty in full or recognize sovereignty that did not previously exist. See, *e.g.*, 22 U.S.C. 1394 (providing for the United States to "withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty" over the Philippines and to "recognize the independence of the Philippine Islands as a separate and self-governing nation"); Proclamation No. 2695, 60 Stat. 1352. Surely, if Congress can restore all aspects of a previously divested sovereignty to foreign nations, Congress can restore one aspect of a previously divested sovereignty to Indian Tribes, when the power is one that Tribes traditionally exercised after ratification of the Constitution, that is exercised against those who have

consented to tribal membership, and that is exercised subject to constraints that serve to protect individual liberties. See pp. 39-43, *infra*.

* * * * *

In sum, Congress has plenary authority to restore to Tribes a sovereign power that was divested by virtue of their dependent status. Congress can do so without transforming Tribes into instrumentalities of the United States.

D. Congress's Recognition Of The Tribal Sovereign Power To Prosecute Non-Member Indians Does Not Violate The Due Process Clause Of The Fifth Amendment

The Due Process Clause of the Fifth Amendment, including its equal protection component, does not bar Congress from restoring Tribes' criminal jurisdiction over members of other Tribes. Congress may single out tribal Indians for distinct benefits or burdens so long as it has a rational basis for doing so. Congress ensured that criminal defendants in tribal court are entitled under the Indian Civil Rights Act to most of the same protections to which criminal defendants in federal and state court are entitled under the Constitution. See 25 U.S.C. 1302. If a particular tribal prosecution of a non-member Indian raises due process or equal protection concerns, such concerns are properly raised in that prosecution or on federal habeas review. The mere possibility that a denial of federal rights could occur in a tribal prosecution provides no basis to invalidate the post-*Duro* amendment to Section 1301(2) as a facial matter.

1. Congress may legislate distinct rules governing Tribes and tribal members, and Congress validly did so in amended Section 1301(2)

a. This Court has consistently upheld against equal protection challenges Acts of Congress that treat tribally affiliated Indians, as a group, differently from other persons. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641 (1977); *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976); *Morton* v. *Mancari*, 417 U.S. at 555; see also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (treaty).

As the Court has explained, such laws are based not on "impermissible racial classifications," but on "the unique status of Indians as 'a separate people' with their own political institutions." *Antelope*, 430 U.S. at 646-647. Indeed, in contrast to "immutable characteristic[s]" such as race, sex, and national origin that are "determined solely by the accident of birth," *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (opinion of Brennan, J.), tribal membership is purely voluntary, and it may be relinquished at any time. See *Duro*, 495 U.S. at 694. Accordingly, the Court has stated that such laws withstand equal protection scrutiny "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton* v. *Mancari*, 417 U.S. at 555.

The same standard applies whether an Act of Congress singles out tribal members for distinct benefits or distinct burdens. In *Antelope*, for example, the Court upheld 18 U.S.C. 1153, which subjects Indians, but not non-Indians, to federal prosecution for certain offenses committed in Indian country. The Court rejected the

Indian defendants' contention that their federal convictions "were unlawful as products of invidious racial discrimination," because federal law, in contrast to the state law applicable to non-Indians, did not require premeditation and deliberation as an element of first-degree murder. 430 U.S. at 644. The Court explained that Section 1153, like other federal laws that treat Indians differently from non-Indians, must be analyzed under the rational basis standard applicable to non-suspect classifications, and that the Indian defendants did not seriously contend that the statute failed to satisfy that standard. *Id.* at 647 n.8.

Similarly, in *Fisher*, the Court held that the Northern Cheyenne Tribal Court, acting pursuant to tribal ordinances authorized by the Indian Reorganization Act, 25 U.S.C. 476, could exercise exclusive jurisdiction over child custody disputes involving tribal members residing on the reservation. The Court concluded that denying tribal members access to the state court forum available to non-Indians did not "constitute impermissible racial discrimination," explaining that "such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S. at 390-391.

b. The recognition of Tribes' criminal jurisdiction over members of other Tribes in 25 U.S.C. 1301(2) is rationally tied to the fulfillment of Congress's obligations toward Indians in two respects.

First, Section 1301(2) advances "the congressional policy of Indian self-government," *Fisher*, 424 U.S. at 390-391, by enhancing the authority of tribal laws and tribal institutions. It enables a Tribe to enforce its criminal laws not only against its own members, but also against members of other Tribes who voluntarily

enter its territory. As the Senate Select Committee on Indian Affairs recognized, a Tribe's exercise of criminal jurisdiction over all such Indians comports with "the reality and practice of reservation life," in which "non-tribal member Indians own homes and property on reservations," "are part of the labor force on the reservation," "frequently are married to tribal members," and "receive the benefits of programs and services provided by the tribal government" to all Indians. S. Rep. No. 168, *supra*, at 6-7. Although practices vary, non-member Indians often play a significant role in tribal affairs, including through employment by the tribal government or service as a juror in tribal court.[12]

Second, Section 1301(2) protects Indians, as well as others who reside in or visit Indian country, against lawlessness by non-member Indians. See *Duro*, 495 U.S. at 696 (observing that "the protection of the [reservation] community from disturbances of the peace

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[12] See, *e.g.*, *Impact of the Supreme Court's Ruling in* Duro *v.* Reina*: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. Pt. 1, at 39 (1991) (*Senate Hearing 1*) (statement of Tom Tso, Chief Judge, Navajo Supreme Court) (noting that non-member Indians and non-Indians are permitted to serve as jurors in Navajo courts); *id.* at 45 (statement of Michael Zunie, Chief Judge, Zuni Tribal Court) (noting that non-member Indians and non-Indians are permitted to serve as jurors in Zuni courts); *Senate Hearing 2*, at 44 (statement of Dale Kohler, Chairman of Law and Justice, Colville Tribal Business Council) (noting that non-member Indians serve on Colville Tribe boards and commissions); *id.* at 55 (statement of Harry Smiskin, Tribal Council Member, Yakima Indian Nation) (noting that non-member Indians work for the Yakima Nation or for federal agencies on the reservation); *id.* at 151 (statement of Donald W. Johnson, Chairman, Makah Indian Tribe) (noting that Makah tribal law permits non-member Indians to serve as judges, counsel, or jurors in tribal court).

and other misdemeanors is a most serious matter"). As Members of Congress recognized, because neither the United States nor often the State has jurisdiction to prosecute misdemeanor offenses committed by one Indian against another in Indian country, a "jurisdictional void" would otherwise exist when such offenses were committed by non-member Indians. S. Rep. No. 168, *supra*, at 4. Members of Congress also recognized that, even aside from questions of criminal jurisdiction, the United States or a State might lack the resources to prosecute misdemeanors by non-member Indians. For example, the Senate Select Committee on Indian Affairs found that, after *Duro*, "U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of non-member Indians." *Ibid.* The Committee also found that, even in Public Law 280 States, "state law enforcement officers refused to exercise jurisdiction over criminal misdemeanors committed by Indians against Indians on reservation lands." *Ibid.*; see *id.* at 4-5 (noting that the legislatures of five western States had called upon Congress to restore Tribes' criminal jurisdiction over non- member Indians).

Accordingly, Congress's choice to treat all tribal members differently from all other persons with regard to criminal jurisdiction serves the interests of Tribes and their members as a class by advancing tribal self-government and protecting the safety of the reservation community. That choice does not violate the Constitution's equal protection guarantee.

2. Tribal prosecution of non-member Indians under amended Section 1301(2) does not infringe due process rights

Although the Court recognized in *Duro* that the fact "[t]hat Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits," the Court declined "[i]n the absence of such legislation" to recognize an inherent tribal power to prosecute non-member Indians, invoking "our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'" 495 U.S. at 692 (quoting *Oliphant*, 435 U.S. at 210). The concerns that counseled against judicial recognition of that power in *Duro* do not preclude congressional recognition of that power in amended Section 1301(2).

Congress could reasonably conclude that non-member Indians' personal liberties are, as a general matter, adequately protected in a tribal prosecution—and that, in the event that some fundamental liberty is denied in a particular case, relief can be sought on federal habeas review. The Indian Civil Rights Act guarantees protections to criminal defendants in tribal court that are, for the most part, analogous to the protections that the Constitution guarantees to criminal defendants in federal and state court. The Indian Civil Rights Act includes most of the specific protections of the Fourth, Fifth, Sixth, and Eighth Amendments, as well as more general protections against denial of equal protection of tribal law and deprivation of liberty or property without due process of law. See 25 U.S.C. 1302; see also H.R. Rep. No. 61, *supra*, at 6 (describing the Indian Civil Rights Act as establishing "standards

comparable to the Constitution to regulate tribal actions").[13]

Although some rights guaranteed by the Constitution, most notably here the right to appointed counsel, are not guaranteed by the Indian Civil Rights Act, many tribal prosecutions do not implicate those rights or are, in any event, conducted consistently with them. At the 1991 hearings on the post-*Duro* legislation, Congress was informed that 24% of Tribes then provided counsel for indigent criminal defendants in tribal court, and that 46% provided either counsel or trained lay advocates. *Impact of the Supreme Court's Ruling in* Duro *v.* Reina*: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 1st Sess. Pt. 2, at 218 (1991) (*Senate Hearing 2*); see also, *e.g.*, 137 Cong. Rec. at 9445 (statement of Senator Inouye) ("[F]ree counsel is provided to indigent defendants by the Ute court and by many tribal courts elsewhere."); *House Hearing* 177 (statement of Donna M. Christensen, Attorney General, Navajo Nation) (noting that the Navajo Bill of Rights requires appointment of counsel

[13] Although the Court expressed reluctance in *Duro* judicially to "single out [a] group of citizens, nonmember Indians, for trial by political bodies that do not include them," 495 U.S. at 693, Congress was informed that non-member Indians, although not entitled to vote in tribal elections, may play an active role in tribal affairs. See p. 37 & note 12, *supra*. It is commonplace, morever, for a State to exercise criminal jurisdiction over persons who are not citizens of the State (or perhaps even of the United States), and who therefore cannot vote in its elections, serve on juries, or hold public office. See *Foley* v. *Connelie*, 435 U.S. 291, 296 (1978) (non-citizens may be excluded from jury service); *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973) (State may exclude non-citizens from holding "important nonelective executive, legislative, and judicial positions," held by "officers who participate directly in the formulation, execution, or review of broad public policy").

for indigent criminal defendants). Congress has since authorized funding for entities that provide legal assistance to such defendants. See Indian Tribal Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 103, 114 Stat. 2780, (25 U.S.C. 3663). Alternatively, if a Tribe does not provide counsel for indigent defendants, the tribal court could require the prosecutor to forgo seeking incarceration, as is constitutionally permissible in state court. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 40 (1972).[14]

A criminal defendant who claims to have been denied a right in tribal court to which he was entitled under the Indian Civil Rights Act or the Constitution may seek relief in the tribal court system in the first instance. See *Senate Hearing 2*, at 218 (noting that 97% of tribal court systems provided a right of appeal in

[14] It is not a foregone conclusion that, even in tribal prosecutions in which incarceration is sought, the due process protections of the Indian Civil Rights Act or the Constitution require the appointment of counsel for indigent non-member Indians. A Tribe's prosecution of its own members without appointment of counsel "is accepted by [this Court's] precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Duro*, 495 U.S. at 694. Sufficient consent to proceed without appointed counsel might be found in a defendant's choice to retain membership in his own Tribe, coupled in many circumtances with his choice to reside among another Tribe and to accept the services that it provides to all Indians. Moreover, at least when a Tribe employs informal, non-adversarial processes to enforce its criminal laws, the fairness concerns that require the appointment of counsel in federal or state prosecutions may be diminished. Cf. *Gideon* v. *Wainwright*, 372 U.S. 335, 343-345 (1963). In any event, as noted in the text, respondent has not asserted that he sought, but was denied, appointed counsel in the Spirit Lake Nation Tribal Court.

1991); see generally Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 529 (2000) (describing tribal court decisions applying the Indian Civil Rights Act as "strongly rights-protective, even if the actual doctrines vary somewhat from ordinary federal case law"). And, if convicted, the defendant may seek federal habeas review "to test the legality of his detention by order of an Indian tribe." 25 U.S.C. 1303; see H.R. Rep. No. 61, *supra*, at 6 (explaining that federal habeas review under Section 1303 provides "a remedy for violations of basic fairness" in tribal prosecutions).

There is thus no reason to assume that any non-member Indian would be convicted and punished by a Tribe after a prosecution that denied him any fundamental right. Nor do the few reported cases seeking federal habeas relief from tribal convictions reveal that such rights are being violated by Tribes. See *Senate Hearing 2*, at 30, 33-34 (statement of Sen. Inouye) (noting the absence of any complaints to the Senate Select Committee on Indian Affairs about violations of the Indian Civil Rights Act in tribal judicial systems). The mere possibility that such a case might arise does not deprive Congress of the power to authorize Tribes to exercise criminal jurisdiction over non-member Indians or invalidate amended Section 1301(2) as a facial matter.

Here, respondent did not raise any claim in his tribal prosecution of the denial of any right guaranteed him by the Indian Civil Rights Act or the Constitution. Nor did he seek federal habeas review of his tribal conviction under Section 1303. Although respondent now asserts that his "individual rights * * * are implicated

by his prosecution by a sovereign which does not afford him his constitutional rights" (Br. in Opp. 6), respondent has not identified any specific constitutional right that was denied him or otherwise challenged the validity of his tribal prosecution. As in *Mazurie*, the Court should decline the invitation to hold that an Act of Congress authorizing an exercise of tribal power is unconstitutional, merely because a Tribe might exercise that power in a different case in a manner that would deprive other persons of due process or equal protection. See 419 U.S. at 558 n.12.

II. THE DOUBLE JEOPARDY CLAUSE WOULD NOT BAR THE UNITED STATES FROM PROSECUTING RESPONDENT, EVEN IF CONGRESS COULD NOT CONSTITUTIONALLY RESTORE THE TRIBE'S POWER TO PROSECUTE HIM

The United States would not be barred by the Double Jeopardy Clause from prosecuting respondent even if, contrary to the discussion above, Congress could not constitutionally restore Tribes' sovereign power to prosecute non-member Indians. That is because jeopardy would not have attached in respondent's tribal prosecution.

This Court has deemed it "indisputable" that "before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged." *Grafton* v. *United States*, 206 U.S. 333, 345 (1907); see *Serfass* v. *United States*, 420 U.S. 377, 391 (1975) ("[T]he Double Jeopardy Clause * * * does not come into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused.") (internal quotation marks omitted); *Kepner* v. *United States*, 195 U.S. 100, 129

(1904) ("An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense."); *United States* v. *Ball*, 163 U.S. 662, 669 (1896) (same).

Accordingly, in *United States* v. *Phelps*, 168 F.3d 1048, 1054-1055 (8th Cir. 1999), the court of appeals rejected a non-Indian defendant's double jeopardy challenge to his federal prosecution, which followed his tribal prosecution for an offense with the same elements. The court explained that, because the Tribe lacked criminal jurisdiction over the defendant, jeopardy did not attach in the tribal prosecution. *Id.* at 1054; cf. 2 Op. Att'y Gen. 693 (1834) (concluding that a Choctaw court had acted without jurisdiction in trying a non-Indian defendant for murder and that the defendant should be tried for the murder in the United States territorial court).

Here, as well, if Congress's post-*Duro* amendment to Section 1301(2) could not validly restore Tribes' criminal jurisdiction over members of other Tribes, the Spirit Lake Nation's prosecution of respondent would have been conducted without jurisdiction, and thus would be "absolutely void." *Kepner*, 195 U.S. at 129. The tribal prosecution could not, therefore, operate to bar respondent's subsequent prosecution by the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 1301 of Title 25 of the United States Code provides:

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self- government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

2. Section 1302 of Title 25 of the United States Code provides:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people

peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and* a fine of $5,000, or both;

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* So in original. Probably should be "or".

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

3. Section 1303 of Title 25 of the United States Code provides:

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.